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MĀORI LAND AND DEVELOPMENT FINANCE

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FOREWORD

It was fortuitous that in November 2004, a colleague introduced me to Craig Linkhorn. Craig was visiting Canberra from New Zealand to attend a conference. I was immediately impressed by his knowledge of, and interest in, the Australian native title and land rights scene, especially as he was working at the New Zealand Crown Law Office on issues associated with Indigenous peoples' rights and the Treaty of Waitangi. Subsequently, Craig had the opportunity to spend six months in Canberra. I needed no persuasion in agreeing to him being appointed as a Visiting Fellow at CAEPR.

Craig was at CAEPR from April to September 2005 and worked on a number of issues including tribal governance, commercial uses of inalienable land and other assets, and Indigenous capacity to participate meaningfully in consultative processes. During this time we worked closely (with Jennifer Clarke, an ANU-based law lecturer) in researching and writing the report 'Land rights and development reform in remote Australia'. This report was commissioned by Oxfam Australia during a time when land rights reform was being debated in Australia. Craig's offshore perspectives were invaluable in this research, as were the concrete cases from New Zealand that he provided on the financing of housing on Māori-owned land.

During his time at CAEPR, Craig delivered a seminar in May 2005 on protecting Māori fisheries assets for future generations, and a second, 'Stepping around barriers to financing commercial development involving communal land—some New Zealand examples' in August 2005. This second seminar was also delivered at the Office of Indigenous Policy Coordination then in the Department of Immigration, Multicultural and Indigenous Affairs.

When Craig needed to return to New Zealand, I encouraged him to write up his second seminar as a CAEPR Discussion Paper, which he has now done. The delay in completion has mainly been due to the pressures of Craig's work as Crown Counsel, something that I observed first-hand when I had the pleasure of visiting the New Zealand Crown Law Office in May 2006 to give a seminar myself. But it is also due to Craig's meticulous scholarship that has seen him continue to research and update his original seminar with greater access to source materials when back 'home'.

In the meantime in Australia, the *Aboriginal Land Rights (Northern Territory) Act 1976* was amended in August 2006, ostensibly in part to facilitate greater use of Aboriginal land in townships for business purposes. There has been robust debate in Australia about whether the new law will help, or hinder, more business and greater access to development finance in Aboriginal townships. Under these circumstances, it is important, I think, to have offshore perspectives on similar issues and the New Zealand material and thoughtful policy pointers provided by Craig are welcome. I thank Craig for his efforts and am hopeful that our collaborations will continue in future.

Professor Jon Altman
Director, CAEPR
October 2006

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ABSTRACT

This paper examines issues connected with the availability of finance to develop Māori land and the use of Māori land as security for loans, using two case studies. The paper concludes with some remarks about the New Zealand situation that might be relevant and of interest to those working with Indigenous landowning communities in Australia.

ACKNOWLEDGMENTS

I would like to acknowledge and thank Jon Altman and John Hutton for their comments on this paper. It has also benefited from discussions I had in Australia in 2005 concerning development finance issues for land owned by Indigenous communities. Those discussions were with colleagues at CAEPR, attendees at the seminars I presented on this topic in August 2005, and staff from Indigenous Business Australia (IBA). Finally I would like to thank CAEPR's editorial production team of Hilary Bek, John Hughes and Geoff Buchanan for their work in producing this Discussion Paper.

INTRODUCTION

Māori land is widely perceived as unacceptable to financial institutions as security for a loan for business purposes. This view is fed in part by the inaccurate perception that Māori land is not available to lenders as a remedy if debt secured by that land is defaulted on. The true barriers to use of Māori land for new business developments are more probably practical business issues rather than legal barriers. These include the strength of the business proposal and the strength of the proposed Māori business partner, as well as the understandings held by financial institutions of this segment of the business market. This market segment might simply be insufficiently attractive to major private-sector financial institutions to justify extra effort in the face of easier business prospects elsewhere.

The paper takes the following route. Some key characteristics about Māori land are outlined and some background information is set out on Māori land development. The current legal context is then examined and some features of the business and practical context are discussed. Two case studies provide recent examples of development initiatives using Māori land. The conclusion provides some remarks about New Zealand experience that might be relevant and of interest to Indigenous communities in Australia.

MĀORI LAND TODAY

WHAT IS MĀORI LAND?

It is important to be precise about the 'Māori land' at issue in this paper. Doing so further focuses the paper on under-developed Māori land, rather than a more general focus on Māori owners of land within both the general land and Māori land systems used in New Zealand. For the purposes of this paper 'Māori land' is a statutory category of land called Māori freehold land.¹ Māori freehold land is land held and managed under *Te Ture Whenua Māori/Māori Land Act 1993* ('the 1993 Act'). It is private land, not public land. The land may be owned directly by individuals, beneficially via trustees, or by a corporation² representing individual owners who hold shares in the corporation.³

However, much land presently owned by Māori is not Māori freehold land. There are two general patterns to this. The first is that many Māori people now reside away from their traditional tribal areas. The 2001 Census records that 86 per cent of Māori live in urban areas.⁴ While some of those people will have tribal links to those urban areas, probably most Māori residents of the bigger cities and major regional centres will not. The residential property owned by Māori in urban environments is unlikely to be held as Māori land, and is much more likely to be held as general land. This is the dominant land tenure in New Zealand, which operates under a Torrens system of registration and land transfer.

Secondly, there appears to be an increasing tendency for Māori enterprise (tribal and personal) removing or keeping land outside the Māori land system. Such land is held under the general land system. Most notable

here are the decisions by tribal groups to not have the Māori Land Court jurisdiction and Māori land system apply to all assets transferred to them by recent Treaty of Waitangi settlements negotiated with the Crown.⁵ At another level are decisions taken by Māori-owned businesses to take land out of the Māori land system or to acquire general land and not make it subject to the Māori land system.⁶ This paper does not address Māori-owned land held outside the Māori land system.

THE MĀORI LAND LAW SYSTEM

The 'Māori land' system has particular origins in policies about how people who came to New Zealand after the Treaty of Waitangi was signed in 1840 would obtain rights to land, given that it was accepted reasonably early on in the colony that all land in New Zealand was owned by Māori (Ward 1999: 75). Initially these policies favoured large-scale acquisitions of land by the Crown direct from Māori owners. The vast majority of the land in the South Island was acquired by the Crown in this way through a series of large purchases, before being made available to settlers. Since 1865, a title determination process has generally preceded legally effective private dealings in land interests owned by Māori. Under this system, ownership of the majority of the remaining Māori land base has been determined over time by the Māori Land Court (previously styled the Native Land Court). Land blocks were brought before the Court, or an equivalent title investigation process, to determine who had ownership rights. Claims of ownership were advanced before the Court on the basis of arguments about the strength of customary entitlements to control use of the land in issue. In simple terms, the outcome was that a group of confirmed owners was listed and awarded a title to the land to enable them to deal with that land.

Under this legislated system, ownership of Māori land was usually divided into shareholdings or held in common by those individuals confirmed as owners. In this sense, most Māori land, even where it has multiple owners, has been individualised by this process.

This title determination process, summarised above in simplified terms, has attracted a great deal of criticism over time. It was seen as an attempt to integrate both Māori and western legal norms about land rights. It is now generally accepted that until the *Māori Affairs Act 1953* and the 1993 Act that replaced it, the balance set by legislation and judicial interpretation underemphasised Māori legal norms about community rights in land and overemphasised rights that were created for individuals to divide their interests from the remaining community of owners, in some periods without reference to that community. The system engaged selectively with Māori customary norms about land tenure. The statutory schemes that resulted are considered by some to be a considerable distortion of custom rather than innovations consistent with a changing society (e.g. Kawharu 1977: 15 identifies the Native Land Court (now Māori Land Court) as an engine of destruction of tribal land tenure; see also McHugh 2004: 265–66; Ward 1999: Chapter 8). Since the 1993 Act came into operation there is now a greater emphasis on retention of Māori land for the benefit of its owners and tribal communities. The 1993 Act reflects in many respects a coming to terms with the fact that collectively owned Māori land is a legitimate ongoing form of tenure.

Table 1. How Māori land left Māori ownership						
Acquisition of Māori land	North Island		South Island		New Zealand	
	Square kilometres	%	Square kilometres	%	Square kilometres	%
Purchases to 1865	21,500	18.9	152,500	99.7	174,000	65
Confiscation	14,000	12.3	0		14,000	5
Purchases from 1865	64,000	56.1	0		64,000	24
Land retained	14,500	12.7	500	0.3	15,000	6
Total land	114,000		153,000		267,000	
Source: Adapted from Controller Et Auditor General 2004: 26–7.						
Note: The 2004 source is an approximation reliant upon a number of sources (Te Puni Kōkiri, Land Information New Zealand and the <i>New Zealand Historical Atlas</i> , plates 39 and 41).						

PROFILE OF THE REMAINING MĀORI LAND BASE

Of the Māori land retained in Māori ownership, succession over time to the legal interests of deceased owners has led to proliferation of owners for many properties. In broad terms, unless altered by will, succession has generally been applied by the Māori Land Court as entitling all children to an equal share in their parent's estate. As well as successions swelling the numbers of owners, until the 1993 Act came into operation Māori land blocks were regularly partitioned as members of communities of owners decided to split their land interests. In many cases this led to uneconomic or impracticable land holdings in spite of the good intentions often behind such proposals, which were regularly directed at a sub-group of owners getting control of an area of the original block. Table 1 illustrates broadly how Māori land left Māori ownership through large-scale purchases and confiscation, so that today Māori own just 6 per cent of New Zealand.

Proliferation of owners and excessive partitioning has latterly led to moves to encourage extended family groups and tribal groups to vest individual land holdings in trust for the benefit of the group.⁷ Trustees are usually drawn from members of the group. Acting in a representative capacity the trustees can engage with outside interests on behalf of all who are beneficially entitled and coordinate the interests of the beneficiary group. This lowers administrative costs and avoids the need for each new generation to succeed as individual owners to their forbears' land titles. Existing land titles may be aggregated under the 1993 Act for more efficient management. Where this occurs, ownership interests may also be aggregated so that the land is vested in trustees for the benefit of a tribal group rather than individually owned.

Māori incorporations are corporate vehicles used for a reasonable amount of actively managed Māori land. Land is controlled by the incorporation as a trustee. The incorporation's shareholders are deemed to own the land controlled by the incorporation in proportion to their shareholdings. The incorporation is accountable to its shareholders in much the same way a limited liability company is. It has office holders and a constitution as well as a share register. Māori incorporations are essentially vehicles for collective commercial endeavour by owners of Māori land.

Despite the availability of these tools to ameliorate the impact of earlier policies on the remaining Māori land base, the administrative state of Māori land titles continues to hinder utilisation and development by many landowners. It also indicates a legacy of high transaction costs affecting this land. In a recent report on Māori land administration the New Zealand Controller and Auditor-General highlighted the challenges facing Māori landowners and executive government (Controller & Auditor-General 2004). Māori land today comprises about 15,000 square kilometres (1.5 million hectares) or 6 per cent of New Zealand's total land area; however, the ownership of that land is divided into more than 2.3 million interests (Controller & Auditor-General 2004). This is said to be comparable to the total number of ownership interests for the remaining 94 per cent of New Zealand's land area. The number of owners for blocks varies with 10 per cent of blocks being vested in a single owner (possibly representative) through to 10 per cent with an average of 425 owners each. The overall average is 62 owners per title. Ownership interests in land block shares are recorded to eight decimal places in some instances because the shares are so fragmented through successions (Controller & Auditor-General 2004).

Aside from issues of capital assets retained, development finance and financial and governance capacity of owners discussed further below, development and utilisation is further impeded by both the geography of much of the remaining Māori land base as well as incomplete information about that land. Incomplete information means there is less certainty, and thus higher risks, for people wanting to deal in such land. This contributes to higher transaction costs for development proposals.

Of remaining Māori land, 80 per cent is in remote areas or the poorest land classes.⁸ Nearly 50 per cent of Māori land blocks have not been surveyed. A 2004 report identified that nearly 58 per cent of Māori land blocks have not had Māori Land Court ownership orders registered under the *Land Transfer Act 1952*, the main statutory vehicle supporting Torrens title in New Zealand. A number of transactions affecting such land that require registration cannot proceed until, for example, the land is surveyed and its record of ownership is registered under the *Land Transfer Act 1952* (Controller & Auditor-General 2004).⁹ A major project is underway to improve the currency of ownership records and land parcel records for Māori land. It aims to provide all owners of Māori freehold land with a registered title at no cost to those owners.¹⁰

The largest areas of remaining Māori land are in the North Island, especially in the centre of that island and in the east coast region (Te Puni Kōkiri 1996 cited in Kingi 2004: 7 and Table 1). Available data on organisational administration of this land is from 1996 (Te Puni Kōkiri 1996 cited in Kingi 2004: Table 2). The position will be changed now, in that the land area without any administrative structure will

probably be reduced, but this available data indicated that of the approximately 15,000 square kilometres (1,515,071 hectares) of Māori land:

- Māori incorporations administered 13.7 per cent (207,156ha)
- Ahu Whenua (Land Development) Trusts administered 49.5 per cent (750,187ha)
- No administrative structure existed for 19.4 per cent (293,886ha)¹¹
- A residue of at least five minor categories accounted for the remaining 17.4 per cent (263,852ha)

An ongoing concern about Māori land is that too much of it is under-developed and consequently under-utilised for the benefit of its owners. Absence of structures for land administration where there are more than a few owners is a strong indicator that land might be under-utilised for the benefit of its owners.

BACKGROUND—MĀORI LAND DEVELOPMENT

Having set out some information about the current state of Māori land and its utilisation, it is important to include some background information on Māori land development over time to contextualise the current situation.

LAND RICH, CASH POOR

What were Māori communities to do in the nineteenth century if they were comparatively 'rich' in land but possessed little cash to develop that land, so as to participate in the new 'market' economy dominated by pastoral farming? It should be said at once that many colonists had their own ideas about what Māori should do with their land. The prospect of a rentier class of Māori leasing land to settler farmers was unattractive and contradicted core settler values opposed to landlordism. It was argued that people had not left the United Kingdom in order to come to the other side of the world in order to replicate social structures they had gladly left behind in search of a better life (Hawke 2002: 16–18). Others assumed that most Māori would be a rural labouring class, perhaps with small plots of land for their own support and to supplement seasonal work. It was thought some tribal leaders would make a transition to be gentlemen farmers. Many settlers did not need to reason through how Māori would (socially) control ownership of their land or what Māori would do with their remaining land. A first-order consensus viewpoint was that Māori owned more land than they needed and that the overall progress of the colony would depend on Māori selling that land so that waves of settlers could maximise its productive use. This was a constant theme in Māori land politics in the second half of the nineteenth century and, perhaps, even as late as 1920.

Understandably, many Māori communities did not see themselves this way. Their struggle was to break into the new economy and the advantages brought by the settlers without paying too heavy a price from their cultural or capital wealth. The overall evaluation by many historians and by the Waitangi Tribunal of the land transactions struck in pursuit of these twin goals is that Māori fared poorly on the whole (e.g. see Waitangi

Tribunal 2004a, 2004b, 2006 for the Tribunal's evaluation and the expert historical evidence relied upon). New Zealand society is now engaged in a complex process to evaluate that past experience, acknowledge the mistakes made and to build a better platform for the future. At present a central theme in that exercise of claims and negotiated settlements is to try to appreciate the extent to which the statutory Māori land law system worked against, rather than in support of, Māori goals.

THE STATUTORY MĀORI LAND LAW SYSTEM

Statute-based 'Māori land law' is a complex body of law, not least because of its frequent amendment by Parliament. It is too complex to survey here. Instead I outline some basic features of its operation relevant to enterprise development issues.

Aside from subsistence living or self-financed primary production from land, engagement with the wider marketplace for land generally turned on Māori having secure title to the land. After 1865 the land title determination processes of the Māori Land Court could offer this. But the Crown-derived titles that resulted came at a price. The cost involved was borne by the communities with customary interests in the land. The title determination process was a 'winner takes all' affair. Those individuals named as owners by the process were the only persons outsiders had to bargain with. Although it is a simplification across a long period of time where the law was changed frequently, in general, people with customary interests who were not named as owners had no legally enforceable interest in the land. If this was the first part of the price paid by communities, the second part was the challenge in persuading individual owners of the newly determined land titles to continue to act as a group.

The land title determination system was intended to be transformative of Māori customary land. The system assumed Māori would bring their land before the Native Land Court (or equivalent process) to be processed from a communal to an individualised form of title. At this point it might be retained or it might be sold.

In the latter part of the nineteenth century the majority of the rules governing dealings in land—the title to which had been determined by the Māori Land Court—did not actively encourage or facilitate collective decision-making about land use and development by the community of owners (Waitangi Tribunal 2004b: 513–7). By and large, if a community of owners continued to act collectively that was their own achievement.

This point has been made strongly by the Waitangi Tribunal in its report on claims in the Turanganui-a-Kiwa/Gisborne region of the East Coast of the North Island. The Waitangi Tribunal emphasised that communities of owners did not have effective legal control as a group over the process of selling land—that was largely a matter between an individual seller and the purchaser. By selling individual interests serially, the sellers did not receive money for their land in such amounts as to encourage it to be preserved from consumption for future investment. Instead, it appears that sale proceeds were regularly dissipated. The prices commanded by individual interests often seem to have been devoted to short term consumption or the purchase of

useful but depreciating assets. It is also worth pointing out that the uncertainties associated with buying an individual's fractional, and often undefined, interests in land blocks meant sellers could not command a premium price for their interest unless it was one of the last remaining Māori interests in a land block.¹² The Tribunal's conclusions included the following assessment:

The whole idea of individualised purchase, the complexity and contradiction of the legal regime and the cost of the process and subsistence prices were, together, capable of producing only landlessness and poverty (Waitangi Tribunal 2004b 8.5.9: 521).

LEVERAGING DEVELOPMENT OPPORTUNITIES FROM A LAND BASE

How did Māori leverage development opportunities from their land assets in the colonial and Dominion periods?

Most obviously, Māori sold land in large blocks to the Crown so that settlers would come to that land and economic opportunities would increase in reasonable proximity to where the sellers retained land. In this way sellers hoped to receive benefits from towns and infrastructure being developed in proximity to their communities. Related to this were land sales of smaller blocks in a piecemeal fashion that would generate cash to pay for the development of other land and the acquisition of needed equipment (e.g. stocking and fencing retained land and purchasing horses). Leasing land to pastoralists or the Crown was a third option. Leasing land secured an income stream for the landowners, although it did not necessarily provide an income stream large enough to exceed short-term spending and thereby save a surplus that might be used to develop other land. Further, lessees, including the Crown, appear to have regularly used leasing as a relationship-building exercise and as a precursor to later purchases. Finally there was the direct use of land by its owners for cropping, farming or resource extraction (e.g. flax, timber) in order to trade this produce for money or valuable equipment.¹³

Mortgaging Māori land to leverage development opportunities was not a widespread activity. Indeed there were significant restrictions on the ability to mortgage Māori land for considerable periods through to 1909 (Hayes 2001: section VIII). Hawke (2002) has observed that these restrictions inhibited Māori landowners' access to finance by reducing their ability to assure lenders that in the event of default the principal could be recovered through taking possession of the land.

It now seems obvious that when land assets were not leveraged collectively by a community of owners there might be very little to show for land sales within a short time—as a group or as individual owners. This is because of the sheer dissipating force of spreading money around all those with ownership interests rather than preserving it as a transformed and pooled form of development capital. Strategic sales of some land by Māori in order to develop their remaining land were not the way things turned out for many communities. Where group rights, in Māori cultural terms, were not supported by the policies underpinning statutory Māori land law, the norms on which these rights were based appear to have struggled to remain compelling for participants in the face of the newer individualised ways of dealing in land. Given the undoubted

strength of Māori culture throughout this period, this is significant and appears paradoxical. The complexity appears to be in unpacking the relations between individuals and groups, including the leaders of groups. The question boils down to asking why did individual Māori sell land so readily?

A number of Māori leaders and politicians recognised that many communities appeared to be on the road to landlessness unless policy settings changed. For some communities this recognition was too late. Even with changes in attitude in the twentieth century, it took some time to include policy settings that more readily facilitated development of the remaining Māori land base. With much of the best land sold, that remaining land base frequently consisted of hard-to-use rural land.

After a significant absence from institutional architecture, near the end of the nineteenth century Māori desires to manage land at a community level were accepted to some extent. From 1894 Māori obtained the right to have land managed as a joint asset through the owners forming an incorporation. Māori Incorporations have subsequently become a powerful force for commercial activity on Māori-owned land. Both the case studies in this paper are about Māori Incorporations.

Finance from pooled Māori monies administered by the state, statutory trustees or direct from state sources for Māori land development in the first third of the twentieth century could not meet the demand for development money. This demand gap did not generate a solid private-sector segment of the market. Rather, at the start of the twentieth century it appears many owners of Māori freehold land had their business experience mediated through state agencies such as Māori Land Boards or appointed commissioners operating under legislated rescue regimes.¹⁴ A further category of owners were relegated to the passive position of being lessors in perpetuity of land subject to regulated rents based on the unimproved value of the land. Consequently there was less direct experience of 'being in business' than might be assumed.

This unmet demand for development finance exercised the member of the General Assembly for Eastern Māori, Sir Apirana Ngata. He devoted considerable energy to improving the prospects of Māori farmers and Māori rural communities. He was well qualified to do this from his experience in public office and his work with his own people. In 1929, as Native Minister, Ngata was in a position to greatly accelerate rural Māori land development by successfully promoting through Parliament a scheme to develop Māori-owned land into farms using the state as a facilitator of finance (Ngata 1931). The legislation for these development schemes was promoted alongside a scheme to develop Crown-owned land for settlement by farmers.

The resulting Māori land development schemes are a story in their own right, beyond the scope of this paper. The schemes grew bigger than Ngata's original vision of a circuit-breaking response to development barriers. They became institutionalised and remained a viable mechanism to develop under-developed Māori land for more intensive economic use until the mid-1980s. Many North Island regions saw land developed into farming (and some horticultural) enterprises this way for the benefit of Māori landowners. Following economic reform in New Zealand dating from 1984, state involvement in private Māori land development has been curtailed. In general terms Māori landowners must now engage with the private sector in their plans to develop under-developed Māori land.

THE CURRENT LEGAL CONTEXT: TE TURE WHENUA MĀORI/MĀORI LAND ACT 1993

This paper is focused on the statutory category of Māori freehold land governed by the 1993 Act. As indicated earlier, Māori-owned enterprises can decide to apply to the Māori Land Court to remove land from this land-holding system. Equally, decisions are made about whether to place newly acquired land within this more restrictive system, or to retain it as general land. Where Māori own land in the general land transfer system, it can be traded and offered as security without the restrictions discussed below applying.

DEALINGS IN LAND CONTROLLED BY THE 1993 ACT

The 1993 Act strictly controls many dealings in Māori land by owners and trustees defined as alienations (s.146). The term 'alienation' is defined widely (s.4) and includes: transfers of interests in Māori land; leases and licences, easements, profits, mortgages, charges, encumbrances and trusts made in respect of Māori land; forestry rights over Māori land; arrangements to dispose of Māori land; arrangements to succeed to Māori land on the death of any owner; and agreements that Māori land be taken for public works.¹⁵

THE POSITION OF MORTGAGEES

There are thus few dealings in land not caught by the definition of alienation under the 1993 Act. An important exception is that the exercise of a mortgagee's power of sale is not counted as a fresh alienation.¹⁶ The alienation that counts in this situation is the granting of the mortgage. While the land remains encumbered by a mortgage it is at risk of sale on default by the mortgagor landowner.

This exception to the controls on alienating Māori land may not be well appreciated. Popular assumptions circulate that Māori land cannot be offered as security for a loan or, if it can be, the lender cannot recover on default. It seems to be regularly assumed that a key barrier to a lender recovering their interests—by selling mortgaged land when the borrower is in default—is the general obligation that before Māori land can be sold on the open market it must be first offered to a preferred class of alienees comprising the kin of the sellers. This is not so.

ALIENATING MĀORI FREEHOLD LAND

The 1993 Act governs 'alienations' of Māori freehold land using thresholds and rights of first refusal to approve alienations by groups of owners. Permanent and longer-term alienations are independently scrutinised by the Māori Land Court system. The core of the process is summarised here.

A sole owner can alienate his or her Māori freehold land block. Joint tenant owners acting together can alienate Māori freehold land. Owners in common¹⁷ or trustee owners¹⁸ can alienate Māori freehold land in the following ways: by sale or gift if owners of at least 75 per cent of beneficial interests in the land consent

(where interests are defined) or three-quarters of owners consent (for undefined interests); by long-term lease¹⁹ if the Court approves and the proposed lease has consent of at least 50 per cent of beneficial interests in the land (where interests are defined) or half of the owners (for undefined interests); in any other way by owners in common if all owners consent or a resolution is passed at a meeting of assembled owners.

A Māori Incorporation can alienate Māori freehold land vested in it by sale or gift if shareholders holding at least 75 per cent of the total shares in the incorporation approve;²⁰ or by long-term lease if the Court approves and the proposed lease is authorised by a resolution of shareholders who hold 50 per cent or more of the total shares in the incorporation.

Finally, a person with a life interest in Māori freehold land cannot alienate that land unless he or she has obtained the consent of all people entitled to the land at the end of that life interest (i.e. those entitled in remainder). While the person holds the life interest they are obliged to act as a *kaitiaki* or guardian of the land in accordance with Māori customary values and practices (*tikanga Māori*) (s.150D).

RIGHT OF FIRST REFUSAL OWED TO PREFERRED CLASSES OF ALIENEES

A member of one of the two preferred class of alienees in the 1993 Act has a statutory right of first refusal to acquire an interest in Māori land before it can be offered for sale or as a gift to people beyond the preferred class (defined in s.4). Only these two types of alienation attract this obligation. This system is designed to assist Māori to retain Māori land in Māori ownership within a kinship framework. The first preferred class comprises: children and remoter issue of the alienor; *whānaunga* (relations) of the alienor associated with the land under *tikanga Māori*; other beneficial owners who are members of the *hapū* associated with the land; trustees for these first three sub-classes above; and, descendants of any former owner who is or was associated with the land.²¹ The second preferred class relates to the sale of shares in a Māori Incorporation and comprises the same persons represented in the first class with the addition of the Māori Incorporation itself, if no one else from another sub-class wishes to purchase the interest that is for sale.

ROLE OF THE MĀORI LAND COURT IN CONFIRMING ALIENATIONS

The Māori Land Court has a role to confirm independently that alienations of Māori freehold land are in order.²² This is a protective jurisdiction. Sales or gifts of land require confirmation from the Court. Lesser alienations require a certificate of confirmation or notation from the Registrar of the Court.²³ The sale of undivided interests separately or in small groups has in the past been a significant source of grievance about Māori land law. This is now prohibited.²⁴ Whilst an undivided interest in Māori freehold land can be mortgaged to a State loan department (Housing New Zealand Corporation, the Public Trust or the Māori Trust Office (s.4)), that land cannot be alienated separately except to a member of the preferred class of alienees (s.148). Further, even that limited permissible alienation of land requires confirmation by the Court (s.150) (by vesting order, or transfer by memorandum between the parties).

The Court must grant confirmation of an alienation if the documentation is in order within given timeframes, or the resolution of assembled owners meets set standards, the alienation would not breach any trust the land is subject to, the consideration payable is judged adequate²⁵ and takes proper account of asset values, the purchase money has been paid or is appropriately secured (this is regulated for many transactions (s.159)), and, any obligation to offer a right of first refusal to the preferred classes of alienees has been discharged (s.152(1)). Until confirmation is obtained from the Court the transaction at issue is of no effect (s.156(1)).²⁶ Evidence of the Court's confirmation is provided by a certificate or court order (s.155). The Court can vary the terms of the alienation, with the parties' consent, in order to address areas where confirmation would not otherwise be granted (s.152(2)). The Registrar must confirm transactions required to be submitted to a registrar if satisfied the documentation is in order, that any required resolution of assembled owners meets set standards and that the proposed alienation does not contravene any trust the land is subject to or the provisions of the 1993 Act (s.160).

THE BUSINESS AND PRACTICAL CONTEXT

ATTITUDES OF PRIVATE LENDING INSTITUTIONS

There is no readily available body of evidence documenting attitudes of private lending institutions to proposals for development of under-utilised Māori land.²⁷ This paper assumes these institutions will consider Māori business proposals involving Māori land on a case-by-case basis, rather than rejecting proposals involving such land as a class. If risk-averse private institutions do decide to avoid an asset class, by reason of its perceived or actual complexity, that is their decision. A spokesperson for Westpac NZ has indicated that business proposals involving Māori land might be of lower priority for institutions able to obtain easier business elsewhere.²⁸ The process set out above that must be followed to properly secure a mortgage of Māori land certainly implies greater costs of transacting than for an equivalent parcel of general land.

Proposals to commercialise undeveloped Māori land can be categorised as start-up businesses. Westpac NZ makes clear in its business start-up guide that applicants for debt finance should provide information on: track record and credit history; amount sought and purpose for borrowing; how and when the amount will be repaid; and what the borrowing might be secured against. Westpac also dampens any assumption that owner's equity can be minimal:

While every business case is different, lenders or investors will usually expect the owners to put up at least half the money themselves for a new business. And the reality for many new businesses is that getting a loan or investment money is very hard—many simply don't meet normal lending or investor criteria at first. So you may find you need to raise the money by using your savings, accessing your home loan or by getting private loans from family and supporters (Newman-Hall 2004: 22).

What do prospective borrowers have to offer to obtain a loan? Westpac NZ makes clear that business assets will often not be sufficient security:

In some cases a lender can use business assets as security. But generally for most new businesses you'll need to provide some sort of personal security as well, such as a mortgage over your home or a personal guarantee. Obviously this is not something you should do lightly, because if something happens to the business it could leave you with a personal debt (Newman-Hall 2004: 23).

From the Bank's perspective this is prudent protection against lightly capitalised small enterprises, usually with separate legal personality from their owners. After all, the business assets might not be readily saleable or worth much in the event of default. These factors might well apply to much undeveloped Māori land. But personal guarantees from office holders in relation to their own homes do not appear to be a ready fit for the collective owners of Māori land (the situation would be different if some of the owners had leased the land from the group of owners for a new enterprise to benefit the lessees).

The key message appears to be that the strength of the business case is the first-order issue for lending institutions focused on risk management. Second is the strength of the people standing behind the proposal—essentially their skills, character and credit-worthiness.²⁹ What is their personal commitment and stake in the proposal? Sound governance of a block of land covered by a business proposal will include ensuring that ownership records are up to date and the block is surveyed and registered. Failure to address these preliminary matters is a significant practical barrier to getting started in business. Finding appropriate security for lending is a question that arises if the two preceding questions are addressed to the lender's satisfaction.

ATTITUDES OF BORROWERS

The Hui Taumata (Māori economic summit) of March 2005 is a useful source of recent viewpoints on debt finance and the building of relationships with bankers for Māori business. A range of contributors accepted that producing 'bankable' business plans is essential for borrowing along with building relationships with lending institutions. It was also acknowledged that the collective ownership of Māori land makes it a less favourable investment option than general land.³⁰ Further, there was acceptance of the need to generate fresh sources of funding to break the lingering perception of Māori asset owners as dependent on the state for project funding. While the Hui Taumata might have unleashed a very productive debate about generating Māori wealth for the future, there is undoubtedly a conservative constituency of people in governance positions for Māori land unwilling to put a group's remaining Māori land at risk for short-term commercial objectives. To these people the stewardship responsibilities they carry for future generations mean this land cannot be treated as just another business asset (see Robertson 2005, comparing tenure systems; Reeves 2005a, questioning conservative 'keep the land' at all costs attitudes). This can be reflected in very conservative asset management and low rates of return. It might also reflect present lower levels of

financial literacy than will be found in the next generation of leaders (e.g. 'Land slide: Diversifying Māori business', *Sunday Star Times*, 27 February 2005).

One approach of borrowers that might be gathering momentum is to leverage development finance from general land and apply it to under-developed Māori land. In this scenario the general land is purchased and mortgaged specifically to raise development money without putting Māori land at risk in the event of default (see reference to Tumunui Lands Trust example, cited by June McCabe (Westpac Bank), Radio New Zealand Mana News, 3 March 2005; 'Land slide: Diversifying Māori business', *Sunday Star Times*, 27 February 2005). Other alternatives currently being considered include seeking private equity/venture capital in place of bank finance, debt funding from foreign sources (such as occurred for the first Tuaropaki geothermal energy plant) and micro-finance (Reeves 2005b). Personal property securities can also be created over non-land assets (New Zealand Institute of Economic Research Inc 2003: 86). Situations where ownership of the produce of land is separated from the land (e.g. forestry rights) might also yield further innovations. The future may thus see a shift in emphasis from managing risks in debt finance from security granted over assets towards managing that risk on a project basis. It might also see greater chances of Māori leveraging their existing asset base more aggressively by cooperating to lend to or borrow from other Māori entities (New Zealand Institute of Economic Research Inc 2003).

SPECIALIST BANKING PRODUCTS

Westpac NZ is one of New Zealand's major trading banks. Its approach to business start-up issues is set out above because it also has a specialist 'Māori in Business' team that can assist staff from throughout the organisation to be as responsive as possible to the needs of Māori business clients. However, Westpac NZ does not have a separate suite of products or services for Māori business clients. Rather, the role of the specialist team is to help to ensure that the bank's standard products and services are relevant and useful to Māori in business, and training is available to staff to assist them to be as responsive as possible. Westpac NZ describes itself as partnering with Māori to promote and assist in the development of a sustainable infrastructure that will meet the long term economic needs and aspirations of Māori communities, businesses and *whānau* (pers. comm. Y. Codde, National Business Development Manager Westpac NZ Ltd, 2 August 2005).

The New Zealand Business Council for Sustainable Development and Westpac NZ (2005) have recently published a booklet encouraging tribes with settlement assets from successful Treaty of Waitangi claims to plan to build those assets into sustainable Māori enterprises, with guidance and case studies on enterprise development. Efficient utilisation of Māori-owned assets and related issues about entity structures are now current topics of interest to professional services firms as well as at least some financial institutions (e.g. Stone 2006).

The two case studies presented here demonstrate a number of practical issues in accessing private-sector finance to develop Māori land. One is a business failure and the other is a promising development, albeit one that is at an early stage.

This is a select sample. Others studies have reported on the range of successful Māori enterprises across industry and service groups (Federation of Māori Authorities Inc and Te Puni Kōkiri/Ministry of Māori Development 2003, 2004; New Zealand Business Council for Sustainable Business Development and Westpac NZ 2005). It is also important to acknowledge that many well-established and successful businesses on Māori freehold land have succeeded in establishing solid relationships with financial institutions. These two cases illustrate challenges in utilising Māori freehold land in development proposals. Both cases came to notice because they generated recent litigation reported in the New Zealand Law Reports. For this reason, there is a base of publicly available information, positive and negative, about these enterprises.

CASE STUDY 1: ETERNAL SPRINGS AND PROPRIETORS OF MATAURI X INCORPORATED

Matauri X Incorporation was formed in March 1967 as a combined ownership vehicle for 544.3 hectares of multiply-owned Māori freehold land at Matauri Bay, Northland, New Zealand.

Matauri X was asset rich and cash poor. Although its Matauri Bay land was worth \$9 million or more, there was little income with which to pay local authority rates. With the support of other members of the committee, Mr Rapata [the chairperson of the committee of management] was keen to raise funds for investment in off-site business ventures. He planned to use the Matauri Bay land as security for the loans (*Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2005] 3 NZLR 193 (CA) paragraph 4).

The committee of management of Matauri X Incorporation entered a joint venture to purchase and operate a water bottling plant in Whakatane, Bay of Plenty New Zealand. The 'Eternal Springs' joint venture involved two other partners. One was an engineer with trade contacts and expertise in water bottling. The other was an investment company, MTech Investments Ltd. The chairperson of Matauri X's committee of management knew the principals of MTech.

MTech's function was to locate businesses and investments in which it would invest by way of joint venture with Māori incorporations. The concept was that MTech would provide the opportunities and Māori incorporations the capital raised on the security of their land (*Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2005] 3 NZLR 193 (CA) paragraph 5).

The joint venture was for one-third equal shares but was capitalised unequally as follows: MTech—\$300,000; the engineer—nothing; Matauri X—\$1million. MTech's identification and promotion of the scheme and the engineer's provision of critical knowledge and trade contacts were the reasons given to justify unequal equity contributions. In addition to its equity contribution, Matauri X was to loan \$1million to the investment company run by the joint venturers for operating purposes. To finance its \$2million contribution to establishing this business, Matauri X was to borrow \$2.55million, secured by mortgaging the Incorporation's land at Matauri Bay. The \$550,000 in borrowings not allocated to the project was to

pay expenses (including a \$200,000 'establishment fee' to the lender) and prepay interest on the loan for a period (\$200,000 capitalised interest).³¹

MTech Ltd projected for Matauri X that its \$2million investment would yield \$11.5 million within two years: in other words, a projected return of more than 275 per cent per annum. The management of Matauri X did not appear to have been alarmed that such a rate of return might indicate a highly speculative business proposition.

Matauri X Incorporation was introduced to Bridgecorp Finance Ltd. The Bridgecorp group is a finance company rather than a registered bank. Its lending business operates beyond normal bank lending criteria. It aims at the bridging finance and project finance segments of the market and prefers to make short-term loans of up to two years. These are generally secured by mortgages against land. Its lending is funded principally by offering investors debt instruments.³²

Bridgecorp's terms for the \$2.55million loan offered, in addition to the \$200,000 establishment fee and \$200,000 prepaid interest noted above, included that the loan be for 12 months with a 12-month renewal option (rollover) with interest at 14 per cent per annum. The capitalised interest would be exhausted first. Security for this loan was to include a registered first mortgage over the Incorporation's land at Matauri Bay.

Bridgecorp's loan offer was open for just two days. The reasons for the short period are not obvious given the relatively cumbersome ownership structure for the land. In any event the loan offer was accepted on the day it was made by the Chairperson of the Matauri X committee of management. Three days later the management committee met to consider developments. At that meeting the committee resolved to endorse and support the Eternal Springs proposal including the loan from Bridgecorp. Again, the management of Matauri X did not appear to have questioned the business case for offering land worth at least \$9million as security for a loan of \$2.55million.

Thirteen days after the loan offer was made the Chairperson and Secretary of Matauri X Incorporation signed mortgage and loan documentation. Bridgecorp advanced the loan money the following day. Nearly a month later the mortgage was registered against title records for the land under New Zealand's land transfer system. Meantime, the existence of the mortgage against this Māori freehold land had been noted by a Māori Land Court Registrar, meeting the requirements of the 1993 Act. Nearly three months after the deal was signed a shareholders' resolution was passed at the Annual General Meeting of Matauri X Incorporation supporting the decision of the management committee to invest in Eternal Springs (2,509 votes in support and 1,800 in opposition).

The projected returns sounded too good to be true, and they were. Before long the business collapsed, in spite of a further injection of \$750,000 from Matauri X Incorporation, also borrowed from Bridgecorp. The joint venture company was put into receivership. For Matauri X Incorporation this meant its \$1million equity

interest in Eternal Springs was lost and its \$1.75million loan to that business was unrecoverable. Matauri X Incorporation remained responsible to Bridgecorp for the loans to fund this failed investment that were secured by mortgage against Matauri's land. At this point, Matauri X had not repaid any principal. It had not paid any further interest on the capitalised interest being used up.

Bridgecorp moved to realise its investment by exercising its powers under the mortgage. Matauri X argued it did not have power to borrow the money and grant the mortgage. Bridgecorp brought legal proceedings against Matauri X Incorporation seeking to uphold the mortgage. Before examining that litigation it is worth continuing with the chronology.

As a result of the business failure, the actions of the committee of management were scrutinised and criticised. This led to litigation in the Māori Land Court to, among other things, remove the committee of management (that litigation is not examined here). The Māori Land Court appointed an administrator to take over management of the land and to formulate proposals for repaying the debt. A number of proposals were explored with shareholders. One involved leasing a large portion of the Matauri X's land to a neighbouring landowner for a term of 60 years. Under this proposal, the Māori owners would lose the use of their land for a long period but retain ownership. Another proposal was to subdivide 10 hectares of the land near the prime coastal part of the block (the Incorporation's land includes sought-after coastal frontage) and lease residential sections for 52-year terms. A further proposal was to sell a portion of the block. It appears these proposals did not garner ready acceptance from shareholders. New Zealand media reported from time to time on delays associated with resolving this issue of liability and the factions that formed within the 430-odd shareholders. The single largest shareholding is held by a Member of Parliament which may help to account for this situation receiving a reasonable amount of media scrutiny.

In April and May 2005 the *New Zealand Herald* reported that a finance company had moved to institute a mortgagee sale of the land to recover money owed. A tender process was advertised with the real estate firm reporting 'a strong level of enquiry' about the land (see *New Zealand Herald* 5 April 2005 'Matauri X block up for mortgagee sale' and 11 May 2005 'Matauri land tender in limbo', both by T. Gee; the second reported that Matauri X owed nearly \$5million in principal and unpaid interest). It was reported that the court-appointed administrator of the land commenced proceedings seeking an injunction from the courts to prevent the mortgagee sale occurring before existing litigation about the lending was resolved. It appears the mortgagee sale was put on hold without the matter being decided by a court, most probably because of a 3 May 2005 decision by the Court of Appeal.

Returning to the litigation generated by Matauri X Incorporation's refusal to honour the loan and mortgage arrangements, two key issues were argued before the High Court and Court of Appeal.³³ First, did Matauri X Incorporation have power to mortgage its land for this off-site investment in Eternal Springs? Secondly, did Bridgecorp Finance, as lender, have to satisfy itself that Matauri X Incorporation was in a position to validly execute a mortgage in favour of Bridgecorp?

The second paragraph of the High Court judgment of Fisher J neatly encapsulates Matauri X Incorporation's failure on the first issue:

I have concluded that Matauri X did have the power to borrow the money for the Eternal Springs investment. It is true that one of the objects of *Te Ture Whenua Māori Act 1993* is to halt the dispossession, alienation and fragmentation of Māori land. But another is to place the destiny of Māori land in the collective hands of its owners and their duly appointed representatives. In this Act Parliament has recognised Māori as adults capable of coming together to determine the way in which their own land will be dealt with in a modern world. If that includes mortgaging the land, that is their prerogative. But everyone knows that if money borrowed on mortgage is not repaid, the mortgagee takes the land. One cannot have it both ways. Matauri X had the power to borrow on mortgage but cannot escape the consequences (*Bridgecorp Finance Ltd v Proprietors of Matauri X Incorporation* [2004] 2 NZLR 792 Fisher J at paragraph 2).

Fisher J decided that Bridgecorp, as lender, did not have to go behind representations made by officers of Matauri X Incorporation in order to satisfy itself that Matauri X could validly execute the mortgage, thus deciding the second legal issue.³⁴ In company and incorporations law this is known as the 'indoor management rule.' An outside party is entitled to assume that a corporate has complied with its own rules in order to enter a transaction. Fisher J saw the rule's application to Māori incorporations as an important point of principle in order to support the objective that Māori incorporations can participate in regular commercial activity.

The scheme of the 1993 Act was that Māori land should be retained but that land proprietors have autonomy to put land ownership at risk by mortgaging it. Fisher J found that changes to the powers of Māori incorporations brought about by the 1993 Act meant the original objects of Matauri X Incorporation had been broadened. This mortgage fell within those extended powers.

On appeal to the Court of Appeal the High Court judgment was overturned.³⁵ However, this was not a clear victory for Matauri X Incorporation. The case was remitted to the High Court for further argument on three issues not fully explored while the parties had pursued primary knock-out issues about whether the mortgage was validly granted or not.³⁶

The Court of Appeal held Matauri X Incorporation did not have power to grant the mortgage for this off-site investment in shares in Eternal Springs because it was beyond the objects of the Incorporation. The Court of Appeal made clear that mortgaging land itself was not a separate object of the Incorporation given the scheme overall of the 1993 Act, thereby disagreeing with the High Court judge. Only borrowing for an object was permissible. Having decided this, the Court of Appeal did not need to address the High Court's legal finding about the indoor management rule. In this sense, the result in the Court of Appeal turns on a technical legal issue not closely connected with the subject of this paper. For present purposes the important point to note is that critical changes in the law about the powers of Māori incorporations were not considered by the High Court judge, so he made errors of statutory interpretation that made his conclusion unsustainable.

What the Court of Appeal did was to follow the statute much more closely to show the way these changes occurred over time, then applying that law to the chronology of the case.

In general terms these changes in the powers of Māori incorporations can be described as follows. When Matauri X was incorporated it was empowered to strive to achieve defined objects. As a body corporate if it wanted to act beyond those objects it had to obtain approval from its shareholders and apply to the Māori Land Court to have the objects amended. In other words, although the Incorporation was constituted a separate legal person it did not have the freedom to act that a natural person does. Its actions were constrained to achieving its objects. Under the statute then in force, the *Māori Affairs Act 1953*, the objects of Māori incorporations had to relate exclusively to the land vested in each incorporation.

When policy makers reformed Māori land law in the 1993 Act they settled on a reform that would grant Māori Incorporations full capacity to act for any lawful purpose subject to express limitations imposed on the incorporation by Māori Land Court processes. Thus, incorporations were to be given general competency to act without the constraint of defined 'objects.'

As initially operative from 1 July 1993, the 1993 Act did not require shareholders or incorporations to take any action to use the new broad general power of competency. However, within a short time this enormous change was wound back somewhat. Later in 1993 an amending Act was passed, and operated from 28 September 1993, to ensure that shareholders of incorporations would consciously move from the object-limited world to the new wider general competency to act by passing a resolution at a general meeting to that effect and obtaining an order subsequently from the Māori Land Court sanctioning this change. After all, land might have been contributed to an incorporation on the understanding the incorporation's powers were confined to specified objects. More broadly, shareholders might prefer to restrict the incorporation's freedom to act.

The High Court judge did not take account of this amendment modifying the policy change.³⁷ The shareholders of Matauri X had not passed the required resolution. Therefore, the off-site investment in Eternal Springs remained beyond the object-bound Matauri X Incorporation at the time the loan contract and mortgage were entered into.

Before any further argument in the High Court occurred, Bridgecorp appealed to the Supreme Court. The parties were granted leave to argue whether the borrowing and granting of the mortgage was within the Incorporation's powers.³⁸

The Supreme Court was to have heard this appeal in July 2005. However, the case was adjourned indefinitely to allow settlement negotiations to continue.³⁹ A settlement was concluded in late March 2006. Under the settlement, the debt of over \$5million was compromised to \$4.3million and refinanced against the land. The compromise involved the lender waiving penalty interest and fees on the debt and the Incorporation voting to change its objects to allow borrowings to be secured against the land. Part of the land will be subdivided into residential sections for long-term lease. The rescue plan is that the revenue from those leases will enable the debt to be repaid and accumulate a surplus to purchase the improvements on the sections at

the conclusion of leases. However, the timeframe involved is long, meaning Incorporation owners will have a daily reminder for the next 50 years or so of the cause of a large holiday home subdivision on their land (Checkpoint, Radio New Zealand, 27 March 2006). The agreed rescue plan is the subject of further litigation. The largest shareholder recently failed to obtain an injunction to halt the subdivision while the Māori Land Court determines his application to exclude several hectares of the land from being affected because it is land where his immediate family is said to have particular interests.

CASE STUDY 2: HIRUHARAMA PONUI, TAUPŌ

The trustee management of the Hiruharama Ponui Block Incorporation wanted to raise finance against the Incorporation's land for a forestry proposal and to pay local government rates. Development prospects appeared to have stalled as the Incorporation struggled to convince financiers and developers that the shareholders would in fact vote to lease the land to fund development proposals.

The shareholders of the Incorporation voted to create a nominee company, leasing some of its land to this company for 80 years at a nominal rental and authorising the committee of management to negotiate a commercial development proposal so that the lease could be varied to suit the particular development settled upon and then assigned to the development enterprise. The lease was registered against the title to the land. By resolving to lease the land, the shareholders of the Incorporation demonstrated that they were prepared to lease their land for a long term for development purposes. This put the committee of management in a stronger position to negotiate a development proposal.

The leased land comprises 19 hectares beside Lake Taupō, a highly regarded holiday destination in the North Island, where waterfront land for development is tightly controlled. A business deal was subsequently agreed between the management of the Incorporation and a property developer. Under this agreement, the development company would take over the lease of the land at a commercial rental, be granted a right of first refusal for a further lease and be granted rights to issue subleases after developing some of the land into a high quality residential enclave featuring condominiums, a lodge, chalets and possibly a hotel. The parties' intention was that the property developer would transform this undeveloped lakeside land into a high quality development where private interests would purchase sub-leases.⁴⁰ These sub-leases would be freely tradable for the remaining term of the lease, and any renewal. Furthermore, buildings (improvements) would be constructed on this land by either the developer or sub-lessees, and compensation would be paid by the Incorporation for these improvements at the conclusion of the lease.

What were the key elements of this arrangement for those involved? The Incorporation leased out land losing the use of it for a long period of 80 years, obtained a commercial rental stream for doing so, and (subject to paying a compensation formula for the improvements) ended up with ownership of a developed 'residential enclave' on prime lakefront land at the conclusion of the lease. The developer saw an opportunity for additional development in a tightly controlled market, albeit in relation to land that was not available for outright sale. The considerable costs and risk of development were obviously assessed as worthwhile given

demand for Taupō lakefront land. The developer calculated that subsequent purchasers of sub-leases would accept an interest less than freehold and that the lease term was sufficiently long to justify both the expense of development and considerable investment in improvements by the lessee and sub-lessees.

Both the Incorporation and, more particularly, the developer anticipated that the strength of the Taupō market for land, especially lakefront land, is such that prospective purchasers would not be put off by the fact that the underlying title is Māori freehold land and that the purchase was of a sub-leasehold interest only. The courage of this assessment should not be underestimated because there have been relatively few pockets of leasehold estates created over Māori land (apart from particular statutory schemes forcing Māori to lease land, for example, to farmers on long-term leases). This is particularly so for the leisure/exclusive residential market at which this development was aimed.

In the light of this attitudinal context it seems to have been of particular importance to the Incorporation and the developer that purchasers of these sub-leasehold interests not be required by law to obtain the approval of the Māori Land Court before they could sell or otherwise deal in their interests. Under one possible interpretation of the 1993 Act, would-be sellers would have to obtain confirmation from the Māori Land Court system of every proposed sale and on-sale of a sub-lease, rather than being able to trade these interests freely in the open market. That was seen as diminishing the marketability of the proposal and the free ability to trade these sub-leasehold interests. It would also have increased transaction costs.

The High Court issued two decisions after proceedings were initiated to obtain declarations about the legality of this deal.⁴¹ The fact that declaratory court proceedings were brought is significant. It demonstrated that both the management of the Incorporation and the property developer were keen to ensure the significant commitment each was making to the project would not be undone later by having overlooked legal issues. The examination of these issues by the High Court is also significant in that, generally speaking, the Māori Land Court has performed a role of scrutinising potential major transactions under the 1993 Act as a protective function for landowners. Here, because of the approach of first granting a lease to a related nominee company, the Māori Land Court did not get to scrutinise the property developer's commercial proposal under the law as it then stood. Indeed, the Incorporation and the developer wanted confirmation from the High Court that their proposals did not require formal approval or confirmation by the Māori Land Court.

The matter had to be argued twice before the High Court. The first time around, the Incorporation and the developer failed to persuade the judge that the variation of the lease and its assignment to the developer did not need to go before the Māori Land Court for approval. On release of this judgment in March 2003, the Incorporation and the developer applied to have it recalled and amended on the basis of overlooked legal issues and further evidence was led about the processes that had been followed.⁴² This application was successful, meaning the judgment was recalled and amended by the judge in August 2003. The High Court found in its second judgment that the variation of the lease to commercial terms and its assignment to the developer from the nominee company did not require the approval of the Māori Land Court, as these events

were within the authority of the initial alienation by lease approved by the shareholders of the Incorporation and taken through the Māori Land Court confirmation process. The case also decided that the sub-interests created below the first lease were consistent with it so that approval to create the lease extended to approval to create tradable sub-interests. This meant that the creation of and subsequent trade in these sub-interests did not have to be confirmed by Māori Land Court processes for the duration of the lease.

The technical legal reasons for both decisions turn on the proper interpretation of changes to the 1993 Act made in 2002. By these changes, the role of the Māori Land Court in relation to alienations of land was amended significantly. That role is summarised in the section above setting out relevant aspects of the 1993 Act. The discussion here is focused on the content of the development proposal for this under-developed Māori land, rather than determining whether the old and new controls on alienation of Māori land were complied with given that the timing of transactions for this development proposal fell across both periods.

Following the court cases, development work began in earnest with processes to obtain resource consent from the local territorial authority. This public process brought some negative publicity to the development. In July 2005 the Māori Television Service news ran a complaint about this land and how it was being lost to Māori. Its use as land leased for a period rather than sold was not mentioned. The tone of the item was that important lakeside land was being lost for Māori customary uses and was to be instead a new sub-division. A representative of the Incorporation said that sacred sites would be protected in the development and picnic areas for owners would be developed from income received. The news item concluded with a prediction that protests would result (Te Kaea, Māori Television Service, 4 July 2005).

Some protest has occurred. In July 2006 media reported on controversy around whether the discovery of human remains on the site during earthworks in January 2006 was wrongly concealed from tribal members for up to six months (M. Watson 'Row over subdivision skeleton', *The Dominion Post*, 17 July 2006). Furthermore, as at August 2006 there is litigation before the Māori Appellate Court about whether the Committee of Management was properly appointed and lawfully able to enter into the lease transaction and variation to commercial terms for this development.⁴³ Protest threats involving Māori land could readily threaten investor confidence and are not conducive to selling rights in that land to all comers. Marketing efforts for the development have included a website, sales brochures and extensive print media advertising.⁴⁴ The website includes an open letter of endorsement from the Incorporation describing their work with developer as a successful partnership. The land under development has been named Parawera.

The promotional material makes clear to prospective purchasers that in each release of sections in the Parawera development there are two options. The first is to purchase a sub-leasehold section to build upon. The second is to purchase a one-eighth interest in a sub-leasehold section along with one of eight 'fisherman's retreats' or similar chalets built for the purchasers on that block. The promotional material contains an explanation of the leasehold tenure: 'Each purchaser receives an individual sub-leasehold title which can be mortgaged and re-sold on the open market'. Further on: 'Each purchaser receives a sub-leasehold title for a term expiring one day before the Head Lease'.

The promotional material also emphasises that should no fresh lease be offered on terms acceptable to the head lessee (presently the development company) then the Incorporation must purchase all improvements on the development block. In other words, as described in the sales material, the landowners do not appear to have the option of adjusting the area made subject to a subsequent lease and buying out the improvements in stages. Presumably the sales material describes the situation this way in order to reassure prospective purchasers that all owners will be treated the same way should no further lease be offered. The documentation also makes clear that the head lessee has discretion to refuse any further lease offered by the Incorporation. If this occurred, the Incorporation would have to purchase the improvements on the land as the lease relationship would be at an end. The formula for purchasing improvements from sub-lessees, if no further lease is offered, values the improvements on each block, ignores land value, and deducts 15 per cent of the value of the improvements. This amount is then owed to each sub-lessee. As well as the one-off sale price to secure a sub-leasehold interest in a land block for nearly 80 years, purchasers must also meet annual ground rent obligations (reviewed every eight years) and their share of the body corporate charges. These charges are to maintain the common facilities which include shared recreational facilities as well as more mundane things like roads and paths. Estimates of these are provided in the promotional material.

At August 2006 it appears the development has been completed and sub-leasehold interests in the land blocks at the Parawera development are still being actively marketed for sale.

POINTS OF INTEREST TO PEOPLE WORKING WITH INDIGENOUS LANDOWNING COMMUNITIES IN AUSTRALIA

Having set out two case studies and background information about the New Zealand situation, the purpose of this section is to offer some remarks about those circumstances that might be relevant to people working with Indigenous landowning communities in Australia. At present there is some focus in Australia on asking how more under-developed Indigenous-owned land might be committed to commercial projects. Obviously there are many differences in the way that Māori land is regulated in New Zealand from land rights land or native title land in Australian jurisdictions. The focus here is not on trying to describe those differences. At a broader level, however, a number of the challenges faced by Māori owners of under-developed land appear interesting in light of current debates about increasing economic activity on Indigenous-owned land in Australia.

There is a regulatory environment constraining the manner in which Māori freehold land can be lawfully mortgaged. Once it is mortgaged, however, it may be sold in the event of default by a mortgagee in possession, as for general land. The availability of this conventional legal remedy does not appear to have changed lenders' attitudes as a group in any fundamental sense. Instead there appears to be a reluctance to regard undeveloped Māori freehold land as adequate or appropriate security by itself. For business rather than legal reasons the category of Māori land does not appear to be assured as bankable.

Higher costs of transactions involving Māori land must inhibit some activity. This flows from more complex ownership structures involving large numbers of affected people, as well as legal obligations that require a significant range of transactions be examined by the Māori Land Court system. These costs are a trade-off for the protective system the Court is meant to operate and the cultural reasons for ownership of the land being widely held. That protective system is avoided when land is removed from the Māori land system or when (re)acquired land is not added to that system by communities wanting to avoid: these costs, any chilling effect that the status of Māori land might have in establishing or maintaining relationships with financiers, as well as public scrutiny by judges of commercial transactions that would otherwise remain largely private if executed over general land.

Strong proposals for developing under-developed land focus heavily on the strength of the business case put forward for utilising that land. For the Hiruharama Ponui Incorporation it seems that the business case for the property developer aligned sufficiently with that of the owners as the landlord only when there was a firm proposal for a long lease of the land.

Strictly speaking, the Matauri X Incorporation case was not about development of the under-developed land asset of that Incorporation. Rather, the Incorporation's land was secured for a loan to initiate an off-site investment. A second tier financial institution was prepared to finance that investment given the much higher value of the Matauri X's land secured by mortgage and the Matauri X's willingness to pay a high interest rate in recognition of the risk levels. Matauri X's investment was a failure. The eventual compromise of the resulting litigation between the Incorporation and the finance company, after a number of years, shows there was no ready mechanism to separate the parties to the deal once it soured.

The fact that complex litigation resulted, challenging the mortgagee's ability to sell the land on default, might reinforce perceptions of the wisdom of risk averse financial institutions avoiding a market segment that might attract significant and negative publicity as well as litigation when the owners face the prospect of the land being sold because of a mortgage default. In such circumstances the lender's legal right to address default by selling the land forms only a part of the overall risk profile of such lending. There are also costs for lenders and borrowers to consider in establishing, monitoring and recovering lending against such land.⁴⁵ Equally, the Matauri X example demonstrates that even borrowers in a comparatively weak position can secure some finance. The price to be paid is in the terms and conditions on which that finance is made available.

This brings to the fore the weakness in internal governance capacity illustrated by the Matauri X example. At one level those on the committee of management acted responsibly. They sought and received advice from an independent investment company, as well as other professional advisers. At another level the group in charge failed a basic test in evaluating the credibility of the business proposal put in front of them and

might have been vulnerable to advisor capture. 'If the returns sound too good to be true they probably are' is the aphorism given in hindsight to this example. Professor Mason Durie summarised the situation as follows:

A combination of limited business acumen, misunderstandings between management and shareholders, and unrealistic expectations of the legislative protection from commercial realities had combined to deliver a harsh and costly lesson to the incorporation, with timely warnings for the governance and management committees of similar bodies (Durie 2005: 76–8).

The practical result for the Matauri X landowners is that they remain responsible for this debt. Debating the validity of the mortgage granted over the land, responsibility for ensuring any mortgage was valid, and the legal effects of registering the mortgage actually executed will have been an expensive exercise. All of the proposals for a way through this situation that have been publicised acknowledge this reality. The compromise resolution of this dispute, reached in late March 2006, means the owners will lose use of some of the land for approximately two generations in order to repay the debt.

The Hiruharama Ponui study should be acknowledged as a successful enterprise. Yet it is worth reflecting on the route taken in order to minimise engagement with the supervisory regulatory regime under the 1993 Act. This involved an initial lease to a nominee company controlled by the landowners. It was that transaction that was scrutinised by the Māori Land Court rather than the subsequent transfer and variation of that lease to commercial terms—when the commercial property developer came on board. Further, it appears to have been important to the parties that all subsequent trade in the sub-leasehold units created by their scheme not have to engage with the protective system for dealings in land under the 1993 Act, but instead be tradable freely on the 'open' market. This further casts the protective jurisdiction discharged by the Māori Land Court as a barrier, adding complexity as well as additional costs to commercial dealings involving Māori land such as this one.⁴⁶ It might also indicate a lack of confidence by commercial participants in operating with certainty within that protective system. A stimulus paper on Māori assets for the Hui Taumata 2005 suggested 'The Court does not necessarily have the entrepreneurial vision that might support a more business-focused approach to utilisation of assets' (Reeves 2005a: 22). This is a considerable challenge given the very small size of the Māori Land Court bench relative to the rest of the New Zealand judiciary, as well as the legal boundaries limiting the ability of litigants to appeal decisions of the Māori Land Court to courts of general jurisdiction where commercial disputes are more usually adjudicated. The challenge must be weighed up, however, against the benefits of a specialist branch of the judiciary allocated a socially important protective task.

Another point to take from the Hiruharama Ponui study was the route taken by the landowners to sell the development opportunity to a commercial property developer along with the risks and rewards that went with that opportunity. That left the owners in the relatively lower risk position of being the landlord of someone else's project rather than in control of the whole scheme. There is no doubt a range of good reasons for this arm's length or indirect investment approach in this case. But it is worth remembering the general point that the owners struggled to attract investor interest in proposals for this prime lakeside land until a

long-term lease was in place. Of course, it is important to acknowledge that at the conclusion of the lease, or after any renewals, the landowners will control a fully developed and maintained asset by purchasing from the lessee and sub-lessees the improvements constructed on the land. Whether at that time this purchase process will have to be financed from retained rental monies, or whether debt finance will be available to the Incorporation, remains to be seen.

The issue of whose development this is appears to remain a current issue for the owners of the Hiruharama Ponui Incorporation. There may be some tension amongst the wider community of owners in an outsider controlling this property development, albeit under a commercial lease freely negotiated between the Incorporation's management and the property developer. There was negative publicity that Hiruharama Ponui owners were going to be shut out (literally) of the gated community built on this land and would be left with a picnic area to one side. There is some history of Māori landowners making available, or being forced by legislation to make available, their land for farming and forestry developments and concern that Māori landowners were not in control of these enterprises or in strong partnership relationships.⁴⁷ In this development, criticism has also been levelled at the committee of management about how it handled the discovery of human remains during earthworks for the development and the community's right to be informed about that discovery and to take appropriate action in relation to it. There is presently litigation about the authority of the committee of management to lawfully commit the owners to the transaction at all.

Since the end of state-funded Māori land development schemes in New Zealand there has been little by way of direct state support for under-developed Māori land beyond ideas such as promoting a business-friendly environment, state-sponsored general business mentoring and literature on how to go about engaging in enterprise development.⁴⁸ Market forces drive the availability of development finance. Conventional legal remedies such as the mortgagee's ability to sell Māori land secured by mortgage in the event of default have not made Māori land bankable as an asset class. There is no New Zealand equivalent of the Australian state-controlled Indigenous Business Australia or the Indigenous Land Corporation. There are limited development funds controlled by private Māori institutions. There does not appear to be evidence of Indigenous-controlled wealth being pooled across tribal boundaries for higher order cooperation and to circumvent limited financial sector interest in under-developed Māori land.

Experience in remote Australia suggests that a goal of developing under-developed Indigenous-owned land will not of itself be the driver of private-sector finance availability. On its own terms, whether this land was freely alienable or not, much of this land is in the poorest land classes and is remote from markets. Rather, land use might be a component of a credible business proposal that successfully attracts finance.⁴⁹ A credible business plan is central to project-based finance using assets that might not otherwise easily attract a lender. Research into the attitudes and preparedness of major Australian financial institutions to lend against Indigenous-owned land where alienation is restricted would be a valuable addition to the current policy debate about the benefits or drawbacks of making land rights land more readily alienable, including by long-term leases to government entities.

This paper has suggested that, in common with many small enterprises in start-up mode, there are practical barriers ahead of legal constraints to borrowing money secured against Māori land. These turn to a considerable degree on the strength of the business case and the strengths of the people promoting that case. After all, lenders are very interested in the management skills and intentions of prospective borrowers. Where landowners cannot point to a strong track record of robust and prudent governance of their collectively-owned land assets it must be difficult to establish or maintain strong relationships with financial institutions. It is not surprising if those institutions admit that business prospects are easier in other market segments. When a proposal is accompanied by evidence of a sizable cash commitment or a readily securable asset offered up by the borrower, this is no doubt easier to bank on than a proposal where the borrower's equity in the proposal is largely or entirely tied up in Māori land—an asset that cannot be as readily put at stake as general land can be.

In spite of difficulties in attracting debt finance to develop under-utilised Māori land, development of commercial enterprises on this land remains a goal for many groups of landowners. Where people are conscious of the way in which capital was dissipated from the historical land-selling process that saw most of New Zealand transferred to non-Māori ownership, there is greater appreciation of a need to act strategically to fund the development of remaining land, ensure people are equipped with the skills to manage development projects on that land and, most importantly, obtain the confidence of lenders who will support those projects. In this context it is completely understandable if Māori landowners are conservative in business proposals involving their tribal land. After all, this land's fundamental importance is usually not measured in financial terms to its owners. It also seems obvious that Māori landowners will want to retain as much control as possible over their development projects whilst accepting that all borrowing involves giving up some control in order to assure the lender that interest owed can be paid and the principal secured.

Given the circumstances faced by Indigenous communities in Australia to achieve recognition of rights to land and ownership of some land after colonisation it would be unsurprising if those communities similarly resisted losing control of the pace and approach to development of mainstream economic activity on that land base to outsiders.

NOTES

1. Māori freehold land has had its beneficial ownership determined by the Māori Land Court by freehold order.
2. Māori incorporations are a particular statutory corporate vehicle for holding Māori freehold land. They have been available since 1897.
3. General land owned by Māori can also be brought within the application of the 1993 Act for a number of purposes. General land owned by Māori is land that is owned for a beneficial estate in fee simple by a Māori or by a group of persons of whom a majority are Māori.
4. See Barcham (2004) for a discussion of policy influences on Māori mobility and urbanisation after World War Two in particular. Bedford & Pool (2004) also discuss the same mobility issues.
5. For example, see s.22 of the *Waikato Raupatu Claims Settlement Act 1995* (the 1993 Act does not apply to land vested in the settlement entity).
6. For example, see s.256 *Te Ture Whenua Māori/Māori Land Act 1993* which sets out processes by which a Māori incorporation may acquire and dispose of investment land separate from its core land and how such investment land can be held as general rather than Māori freehold land.
7. In this paper the term tribe is used generally to refer to Māori communities connected by kinship and acting for a common purpose. It is intended to refer to interests wider than the extended family (*whānau*) that in the Māori language would be described as held by *hapū* and by *iwi* groupings depending on the context and facts.
8. Compared to the arid zone in Australia, however, there is greater scope in New Zealand to use comparatively poorer classes of land for forestry, pastoral farming and some arable farming activities. Mountain sides and other steep slopes can be a practical constraint on land use in New Zealand.
9. A prerequisite to registering transactions affecting that land are the deposit of plans, following survey, that can be deposited in New Zealand's land transfer and registration system. The absence of survey is a preliminary hurdle to entering transactions in many circumstances. See also New Zealand Law Commission (2001) for background statistics on Māori land utilisation. Robertson (2005) has listed a number of practical impediments to harmonising the Māori Land system and Land Transfer system records, and goes so far as to suggest the current priority of registering Māori land titles is misdirected because of alienation restrictions on that land.
10. The Māori Land Registration Project is an initiative of the Māori Land Court and Land Information New Zealand. An outline of the project is available at www.justice.govt.nz/maorilandcourt/registration-project.htm (accessed 26 August 2006).
11. Kingi (2004: 7) says this includes 135,400ha administered by the statutory Māori Trustee. It will also include small family-owned parcels of land.

12. Interests in Māori land might be divided or undivided: the latter being an equal share along with the other named owners. The former being a quantified shareholding out of a total number of interests. This was a different matter from those interests being undefined in the sense of there being no legal certainty about where within the land block a person's share was located. Rather, each owner held their interest over the whole land block. (e.g. a purchaser of three out of nine equal interests in a land block might decide not to purchase any further interests. In order to define exactly what land they had purchased, and separate it from their Māori co-owners, the purchaser would typically apply to the Māori Land Court to partition out their purchased interests). This would set up a contest between the group of owners as a whole as to where the purchaser's interests should be physically located on the land block. Things such as topography and access to roads would influence such contests. There were obviously also costs involved in partitioning land including survey, fencing and court costs.
13. Until 1909 the ability to mortgage Māori freehold land was generally tightly controlled by the state irrespective of the practical availability of private development finance secured by mortgage. It was permitted for Māori freehold land from 1865 until 1878 but prohibited altogether from 1878 to 1888. From 1888 until 1894 ability to mortgage this land was reinstated but then from 1894 until 1909 this was more tightly controlled. An 1897 initiative permitted the mortgaging of land if it was first vested in a competent trustee. This initiative permitted owners of multiply-owned land to borrow from government departments (*Native Land Laws Amendment Act 1897*). From 1909 onwards, the ability of Māori to borrow was increased. Under the *Native Land Act 1909* mortgages of Māori freehold land required confirmation by the relevant Māori Land Board. Mortgages to recipients other than the State Loan Department required the consent of the Governor in Council. Māori Incorporations had power to borrow from the State Loan Department with the consent of the Governor in Council. This increased ability to mortgage land in return for loans built on a growing acknowledgment that, in many areas, Māori were no longer primarily going to be sellers of land. This is not to suggest land sales were no longer going to occur. Rather, development of Māori farming enterprises, assisted to some extent by the machinery of state-institutions, was now a policy goal where it had previously not been.
14. See Hill (2004) for information on Māori Land Boards and the Waitangi Tribunal (2004b) for an account of a rescue scheme involving the East Coast Trust and the East Coast Commissioner.
15. The term alienation in the 1993 Act, however, does not include: dispositions by will of Māori land or an interest in Māori land; dispositions effected by Māori Land Court order; the surrender of leases and licences over Māori land; leases or licences (including variations and transfers), or contracts and arrangements to grant a lease or licence, granted for not more than 3 years in total; sale of Māori land by a mortgagee under a power expressed or implied in an instrument of mortgage.
16. The same situation applies to a mortgage obligation still in place when an owner dies. The restrictive regime controlling the extent to which Māori land can be applied to pay debts owed by an estate does not apply to mortgages (s.104(7)).
17. Sections 147 and 150C. Sales for minor boundary adjustments are exempted from the restrictions if the Court is satisfied the adjustments are necessary (ss150A(2) and 150C(2)).
18. For Māori freehold land vested in a trustee, a person with a beneficial interest in the land can alienate that interest in the same way as if they held the legal interest (s.149).
19. A long-term lease is defined in the 1993 Act as one for a term of more than 52 years including renewals (s.4).

20. As for other owners, sales to effect minor boundary adjustments may be excepted from this regime (s.150B(2)).
21. *Tikanga Māori* are Māori customary values and practices. A *whānaunga* is a relative. A *hapū* is a kin group comprising a number of associated extended families—*whānau*. Relations with customary connections to the land are within the class rather than merely any relation of the alienor. The sub-class of co-owners of the land excludes outsiders who have purchased interests and is restricted to the *hapū* kin group associated with the land.
22. 1993 Act, Part 8—duties and powers of the Māori Land Court in relation to alienations of Māori freehold land. Since amendments to the 1993 Act in 2002, alienations are now more straightforward once the set thresholds described above are met. A number of elements of judgement previously underpinning the Court's evaluation of alienations have been largely removed. For example see repealed ss153–154.
23. For sole owners, joint tenants and owners in common these lesser alienations are leases, licences, forestry rights, profits, mortgages, charges or encumbrances (s.150C(3)). For incorporations and trustee owners these lesser alienations which require noting by the Registrar of the Court are leases, licences and forestry rights granted for terms of more than 21 years (including renewals) and all mortgages (ss150A(3)(b) and 150B(3)(b)).
24. Section 148. An example of an undivided interest would be where a group of 16 people own a piece of land in common equally. If one of their number sold his or her interest to an outsider that person would acquire an undivided one-sixteenth interest in the land. In a number of instances single undivided interests were accumulated by outside purchasers (Crown or private buyers) without reference to the remaining community of owners and where those outside purchasers later applied to partition out the interests they had acquired.
25. Adequacy must be judged by having regard to any relationship between the parties as well as any special circumstances. Every confirmation application must be supported by a special valuation by a registered valuer paid for by the applicant. The Court must have regard to the valuation but is not bound by it in determining the adequacy of the transaction (ss152(1)(d) and 158).
26. On attaining confirmation the transaction takes effect from the date it would have taken effect if alienation was not required subject to any requirements to register transactions under the *Land Transfer Act 1952* (s.156(2)).
27. New Zealand Institute of Economic Research Inc (2003) emphasises that problems in accessing finance *could* be (rather than *are*) an important obstacle to realising Māori development aspirations because there is no ready way to evaluate the size of the problem. The research tends to be case-study based (as this paper is) so representativeness is difficult to judge. There is also no comparative data on the ease or difficulty of non-Māori access to finance (2003: 82). This information—including success rates for applications for finance—is simply not available to researchers, hence the focus on case studies.
28. June McCabe (Westpac Bank) speaking to interviewer Dale Husband on Radio New Zealand Mana News, 3 March 2005. Ms McCabe acknowledged that Māori multiply-owned land was generally not good enough security for a lender, so the lender had to find alternative ways to look at transactions. In her view such a shift would lead to a focus on the merits of the business proposal over and above the security available: 'That's not easy because people choose to do deals that are immediately available. That's what happens in a big bank when you say well, this is an easier deal and Māori deals are harder deals.' Ms McCabe was advocating that financial institutions and government think afresh about opportunities for banks to finance the development of Māori land by working collaboratively with Māori. Specifically, she advocated renewed examination of banking products that can work with co-operative structures.

29. New Zealand Institute of Economic Research Inc (2003: 83) stresses that on a like for like basis it is difficult to determine whether Māori have distinctive problems in accessing finance compared to other similar non-Māori businesses. In his presentation to the 2005 Hui Taumata (Māori economic summit) the economist Adrian Orr suggested Māori businesses are bankable when their management is respected, their boards are credible, and their use of the underlying assets can demonstrate good cash flow. For 'greenfields' projects direct equity will be expected (Orr 2005).
30. See Reeves (2005a) and Hui Taumata Day Two Summary of Panel on Capital facilitated by Peter Douglas, especially contributions by Adrian Orr and Fred Cookson.
31. The destination of the final \$150,000 is not apparent from the reported judgments.
32. See <<http://www.bridgecorp.co.nz/>> [accessed 16 July 2005].
33. The High Court of New Zealand is the originating court of general jurisdiction for civil litigation. Appeals from its decisions are to the Court of Appeal. Appeals from the Court of Appeal are to the Supreme Court via a leave to appeal procedure.
34. *Bridgecorp Finance Ltd v Proprietors of Matauri X Incorporation* [2004] 2 NZLR 792 Fisher J at paragraphs 3 and 62–77.
35. *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2005] 3 NZLR 193 (CA).
36. The three issues requiring further argument are: the effect of statutory codification of the indoor management rule in Te Ture Whenua Māori (s.271); the effect of registering the mortgage under the land transfer system; and, a cause of action raised by Bridgecorp about the legal effect of Matauri X Incorporation taking the money advanced (money had and received).
37. The Court of Appeal pointed out they did not regard this failure as the judge's fault since counsel appearing in the High Court had not referred Fisher J to this amending law.
38. *Bridgecorp Finance Ltd v Proprietors of Matauri X Incorporated* [2005] NZSC 31 (2 June 2005).
39. <<http://www.courts.govt.nz/supremecourt/currenthearings.html>> (accessed 6 July 2005).
40. The judgments of the High Court describe a proposal to create unit titles from the main leasehold interest. It is not clear from subsequent publicity material whether this is still intended. This paper refers to sub-leases accordingly.
41. *Proprietors of Hiruharama Ponui Block Inc v Attorney General* [2003] 2 NZLR 478 and *Proprietors of Hiruharama Ponui Block Inc v Attorney General (No 2)* [2004] 1 NZLR 394.
42. It might be notable that in both case studies the first instance statutory interpretation was corrected on further examination. This might indicate both that the legal issues were not thoroughly argued by participants as well as the continuing complexity of the Māori land law system. Both cases involved assessment of the legal effect of amendments to the 1993 Act on the transactions at issue.
43. Appeal 2006/2 (Application A20060011115) by M Te A Bramley against the decision of Deputy Chief Judge Isaac of the Māori Land Court made on 13 February 2006 (83 Taupō Minute Book 81–130).
44. Symphony Properties Limited (2005) Parawera, see also <<http://www.parawera.co.nz>> (accessed 26 August 2006).

45. An issue left unresolved by the Matauri X litigation not being pursued further is the effectiveness of the provisions of the 1993 Act that state a person doing business with a Māori Incorporation need not assure themselves of the propriety of the internal steps taken by the Incorporation to enter an agreement. It is hard to imagine any circumstances in which this codification of the indoor management rule would not be effective to protect a lender.
46. Robertson (2005) regards the Court as a cumbersome process in need of reform that could see administrative power exercised in place of current judicial powers.
47. Perpetual leasing of Māori reserved land under statutory schemes is an example that has received attention in New Zealand. For a discussion see Waitangi Tribunal (2003a) at chapter 16. A further example is joint venture forestry where Māori landowners contributed land and other parties contributed money and expertise. One such scheme has been reported on by the Waitangi Tribunal in its *Tarawera Forest Report* (2003b).
48. This is in contrast with ongoing state support for loans for housing on multiply-owned Māori land in order to counter reluctance by private financial institutions to lend in this area. The approach taken by the state-controlled Housing New Zealand Corporation Ltd to loan money for housing is outlined in Altman, Linkhorn and Clarke (2005).
49. See, for example, the information provided by the Aboriginal and Torres Strait Islander Commission to the Reeves review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) set out in Appendix V of the review report addressing commercial use of freehold [Aboriginal] land (Reeves 1998).
50. A 'Wai' is a Waitangi Tribunal claim number.

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